

No. 10206

United States 12
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

DON LEE, INC.,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

APR 11 1942

W. J. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 21866-R

DON LEE, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF TAXES
AND INTEREST

Plaintiff complains of defendant and for cause
of action alleges:

I.

That this is an action to recover income and ex-
cess profit taxes and interest erroneously and
illegally assessed and collected. That this action
is instituted against the United States of America
under the revenue laws of the United States.

II.

That at all times herein mentioned plaintiff was,
and now is, a corporation organized and existing
under and by virtue of the laws of the State of
California with an office in the City and County of
San Francisco, State of California. Said office is
in the Southern Division of the United States Dis-
trict Court for the Northern District of California.

III.

That on January 1st, 1931, plaintiff owned machinery and equipment, furniture and fixtures, which had a remaining book value of One Hundred Eight Thousand Eight Hundred Ninety and 79/100 Dollars (\$108,890.79) as at that date (cost Two Hundred Ninety-two Thousand Three Hundred One and 22/100 Dollars (\$292,301.22) less depreciation of One Hundred Eighty-three Thousand Four Hundred Ten [1*] and 43/100 Dollars (\$183,410.43)). That on or about said date plaintiff erroneously estimated the life of said property to be ten (10) years from date of acquisition and during the years 1931 to 1935, inclusive, plaintiff entered upon its books and reported on its income tax returns for said years, depreciation on said property computed at the erroneous rate of ten percent (10%) of cost based on said estimated ten (10) year life. That in the years 1931, 1932 and 1933, and each of them, plaintiff sustained operating losses; losses for each said year being in excess of said depreciation reported in each such year.

IV.

That on or about June 8, 1938, defendant estimated the life of said property to be fifteen (15) years from date of acquisition and recomputed the depreciation for the years 1934 and 1935 by erroneously spreading the residual book value of said property at January 1, 1934, (being the cost of said property less depreciation reported by plaintiff in

*Page numbering appearing at foot of page of original certified Transcript of Record.

its income tax returns from date of acquisition to January 1, 1934, based upon an estimated ten (10) year life) over the remaining life of said property, and accordingly disallowed the sum of Five Thousand Eight Hundred Seventy-one and 11/100 Dollars (\$5,871.11) as excessive depreciation deducted by plaintiff in its return for the year 1935 and assessed plaintiff an additional tax thereon, which plaintiff paid on July 11, 1938.

V.

That defendant disallowed said portion of said item of depreciation for said year 1935 on the ground that while the rate of depreciation was adjusted in 1934, the base or residual book value of said property at January 1, 1934, (residual book value determined upon the erroneous ten (10) year life rate) should remain unaffected for the reason that plaintiff had made excessive [2] claims of depreciation on said property for the years 1931, 1932 and 1933 by reason of using an erroneous ten (10) year life rate of depreciation instead of a fifteen (15) year life rate, and that plaintiff is bound by its error despite the fact that no income was offset by said depreciation reported during said years 1931 to 1933, inclusive.

VI.

That said depreciation for the years 1934 and 1935 should have been recomputed upon said fifteen (15) year life rate by spreading the residual book value of said property at January 1, 1931, together with the cost of additional furniture, fix-

tures and equipment acquired thereafter, over the remaining life of the property, thereby reducing the excessive depreciation reported by plaintiff in the years 1931, 1932 and 1933, in which no taxable income was offset by depreciation and increasing the residual book value of said property at January 1, 1934, January 1, 1935, and January 1, 1936. That had the depreciation for said years been so computed, the excessive depreciation for the year 1935 would have been One Thousand One Hundred Seventy-seven and 07/100 Dollars (\$1,177.07) instead of Five Thousand Eight Hundred Seventy-one and 11/100 Dollars (\$5,871.11), the amount disallowed. That by reason thereof, plaintiff paid on July 11, 1938, an additional assessed tax for the year 1935 in the excessive amount of Eight Hundred Eighty and 13/100 Dollars (\$880.13).

VII.

That the allowable depreciation for the year 1936 based upon the adjusted fifteen (15) year life rate and spreading the residual book value of said property at January 1, 1931, together with the cost of additional property acquired subsequent thereto, over the remaining life of the property, would be Eleven Thousand Three Hundred Twenty-seven and 37/100 Dollars (\$11,327.37). That [3] the depreciation allowed by defendant for the year 1936, based upon defendant's erroneous computation as hereinbefore alleged, was the sum of Seven Thousand Five Hundred Ninety-six and 82/100 Dollars (\$7,596.82). That by reason of said erroneous

computation of depreciation for the year 1936, plaintiff overpaid its taxes for said year in the sum of One Thousand Two Hundred Nine and 63/100 Dollars (\$1,209.63). That a portion of plaintiff's taxes for the year 1936 is represented by an additional assessment on June 8, 1938, in the sum of Seven Hundred Fifty-seven and 64/100 Dollars (\$757.64) which plaintiff paid on July 11, 1938.

VIII.

That on or about June 26, 1940, plaintiff duly filed with the Collector of Internal Revenue of the First District of California, two separate claims for refund of excessive income and excess profit taxes assessed and paid for the years 1935 and 1936 based upon the erroneous computation of depreciation for said years, as hereinabove set forth.

IX.

That thereafter, and on or about January 25, 1941, said claims for refund were rejected by the Commissioner of Internal Revenue, and no part of said taxes have been refunded to or received by plaintiff.

X.

That plaintiff is not subject to the tax erroneously and illegally assessed and collected as hereinabove set forth for the reason that excessive depreciation reported on said property for the years 1931, 1932 and 1933, but not deducted from taxable income since plaintiff sustained operating losses in each such year, was not "allowed" within the meaning of the United States Revenue Act or Acts. That

said reported depreciation for said years 1931 to 1933, inclusive, should be adjusted on the basis of an original [4] life of fifteen (15) years, resulting in a reduction of the depreciation in each said year, and a higher remaining base, or a greater net book value of said property on January 1, 1935, and January 1, 1936, and a greater amount of depreciation for each of said latter years.

Wherefore, plaintiff prays for judgment against defendant in the total sum of Two Thousand Eighty-nine and 76/100 Dollars (\$2,089.76), together with interest thereon at the statutory rate from the dates when said sum was paid, and for such other relief as may be proper in the premises.

ZAGON and AARON,

By MARVIN MANUEL,

Attorneys for Plaintiff.

[Endorsed]: Filed May 7, 1941 [5]

[Title of District Court and Cause.]

ANSWER

Comes now Frank J. Hennessy, United States Attorney for the Northern District of California, and for answer to the complaint filed in this action, admits and denies as follows:

I.

Answering the allegations of Paragraph I, admits that the action was filed for recovery of income and

excess profits taxes and interest paid by plaintiff, and that the action is brought under the revenue laws of the United States. Denies that said taxes were illegally or erroneously assessed or collected.

II.

Admits the allegations of Paragraph II. [6]

III.

Answering Paragraph III, admits that on January 1, 1931, plaintiff owned machinery equipment, furniture and fixtures which were depreciable property and were subject to depreciation allowance. Admits that in its income tax returns for the years 1931, 1932 and 1933 plaintiff took \$108,890.79 as the book value of said assets as of January 1, 1931 (computed as alleged) and that in its books of account, and in its returns for 1931, 1932 and 1933, plaintiff computed depreciation on the basis of a 10-year life from the date of acquisition, and claimed deductions on said basis. Admits that in its returns for 1931, 1932 and 1933 plaintiff claimed and reported operating losses which were in excess of the amount of depreciation reported for each of said years. Saving as herein admitted, defendant denies the allegations of of Paragraph III.

IV.

Answering Paragraph IV of the complaint, defendant admits that in June, 1938, defendant, by its officers of the Internal Revenue Bureau, estimated 15 years as the life of said properties from the date

of acquisition and recomputed the annual allowable depreciation. Admits that said recomputation was made for the years 1934 and 1935 and were based upon the plaintiff's book value thereof as of January 1, 1934. Admits that the deduction of \$5,871.11, claimed in plaintiff's return for 1935, was disallowed. Admits that by reason thereof, an additional tax was assessed against plaintiff for 1935. Excepting as herein admitted, defendant denies the allegations of Paragraph IV.

V.

Denies the allegations of Paragraph V. [7]

VI.

Answering Paragraph VI, admits that on July 11, 1938, plaintiff paid an additional tax of \$880.13 based upon an adjustment of the depreciation allowable on the properties referred to in the complaint. Admits that \$5,871.11 was the amount disallowed. Denies the remaining allegations of Paragraph VI.

VII.

Answering the allegations of Paragraph VII, admits that the depreciation disallowed on said properties for the year 1936 was \$7,596.82. Admits that on June 8, 1939, plaintiff paid an additional assessment amounting to \$757.64. Denies the remaining allegations of Paragraph VII.

VIII.

Answering Paragraph VIII, admits that plaintiff filed claims for refund for 1935 and 1936 on the

grounds alleged in Paragraph VIII of the complaint. Denies that said taxes were excessive, and denies that the computation of depreciation was erroneous.

IX.

Admits the allegations of Paragraph IX of the complaint.

X.

Denies the allegations of Paragraph X of the complaint.

Wherefore defendant prays for judgment in its favor, for its costs and for such other relief as may be just.

FRANK J. HENNESSY,

United States Attorney.

ESTHER B. PHILLIPS,

Assistant United States Attorney.

[Endorsed]: Filed Jul. 18, 1941. [8]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby Stipulated and Agreed by and between the parties hereto, through their respective counsel, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the rights of either party to introduce other and further evidence not inconsistent

with the facts herein stipulated to be taken as true and to object at the trial of this case to any of the facts stipulated as being irrelevant or immaterial.

(1) The plaintiff, Don Lee, Inc., at all times hereinafter mentioned, was a corporation organized under and existing by virtue of the laws of the State of California, with an office in the City and County of San Francisco. [9]

(2) The United States of America, the defendant, at all times hereinbefore mentioned, was a corporation sovereign and body politic.

(3) This is a suit of a civil nature arising under the laws of the United States to recover an alleged overpayment of taxes, with interest.

(4) That the plaintiff, on or about January 1, 1931, was the owner of depreciable machinery, equipment, furniture and fixtures, subject to depreciation allowance, which cost \$292,301.22 and which, after deducting depreciation of \$183,410.43, had a book value as of January 1, 1931, of \$108,890.79. The plaintiff on its books of account computed depreciation on the basis of a ten-year life from the date of acquisition of said properties. In filing its income tax returns for the years 1931, 1932, 1933, 1934, 1935 and 1936, the plaintiff reported a deduction of depreciation on the same basis.

(5) On March 14, 1936, the plaintiff filed its income tax return for the calendar year 1935 showing its gross income and deductions, among which was an item of depreciation in the amount of \$40,271.08, and a net income on which income and

excess profit taxes of \$32,454.83 were payable, and which were paid in quarterly installments in 1936.

(6) Thereafter, the Commissioner of Internal Revenue determined that the depreciation allowable to the plaintiff for the year 1935 was not \$40,271.08, as reported, but was \$34,399.97. This, and other adjustments not in dispute, increased the net income and made an additional tax due. A notice of deficiency in income and excess profits tax of \$3,808.50, interest \$517.91, a total of \$4,326.41 was duly given, which was paid on July 12, 1938.

(7) On March 15, 1937, the plaintiff filed its income tax return for the calendar year 1936 showing gross income and deductions, among which was an item of depreciation in the amount [10] of \$37,816.58, and a net income on which an income tax of \$59,695.16 was due, which was paid in quarterly installments in 1937.

(8) Thereafter, upon facts coming to his attention, the Commissioner of Internal Revenue made adjustments (not now in dispute) which increased the net income and resulted in a deficiency in income tax of \$757.64. This deficiency was paid on July 12, 1938 by the plaintiff, together with interest amounting to \$57.57, or a total amount of \$815.21. Thereafter, the plaintiff filed its claim for refund for 1936, in which plaintiff claimed that additional depreciation for 1936 ought to be allowed amounting to \$3,730.55.

(9) The dispute as to allowable depreciation resulted from a determination by the Commissioner of Internal Revenue made in June, 1938 that cer-

tain property upon which depreciation was taken by the plaintiff had a normal and useful life of 15 years from date of acquisition thereafter, and that the depreciation allowable thereafter should be computed on that basis and not on the basis of a life of 10 years as had previously been done by the plaintiff.

(10) The plaintiff filed its claim for refund of tax and interest for the years 1935 and 1936 on June 27, 1940. Said claims for refund were based on the ground that the life of the assets in question was 15 years from date of acquisition, and that since plaintiff sustained operating losses for the years 1931, 1932 and 1933, depreciation for those years should be adjusted on the basis of a normal useful life of said depreciating property amounting to 15 years from date of acquisition, and that if depreciation for those years were so adjusted, the book value of the assets as of January 1, 1934 would be increased and a larger amount of depreciation for 1935 and 1936 would be allowable. These claims for refund were rejected by the Commissioner of Internal Revenue on May 10, 1941. No part of the tax and interest [11] in dispute herein has been refunded to the plaintiff. The plaintiff sustained operating losses during the years 1931, 1932 and 1933 which, in fact, exceeded the depreciation reported.

(11) It is Stipulated that allowance for depreciation for the years 1935 and 1936 upon the basis of a 15-year useful life from the date of acquisition is correct.

(12) It is Stipulated that the plaintiff computed depreciation allowance for 1931, 1932 and 1933 on the basis of a 10-year useful life from the date of acquisition.

(13) It is Stipulated that if plaintiff's contention referred to in Paragraph (10) above is correct, and that the book value of said properties as of January 1, 1934 should be increased by the amount of excessive depreciation reported for the income tax returns for 1931, 1932 and 1933, then the allowable depreciation for 1935 should be increased by \$4,694.04, and the plaintiff has overpaid its income tax for 1935 in the amount of \$880.13; and the allowable depreciation for 1936 should be increased by \$3,730.55. Plaintiff's overpayment of income tax for 1936, if the allowable depreciation is so increased, would amount to \$1,209.63, of which \$757.64, with interest, was paid on July 11, 1938. The statute of limitations has run on recovery of sums paid prior to July 11, 1938, in so far as the 1936 tax is concerned.

ZAGON and AARON,

By HAROLD E. AARON,

Attorney for Plaintiff.

FRANK J. HENNESSY,

United States Attorney,

ESTHER B. PHILLIPS,

Assistant United States

Attorney.

[Endorsed]: Filed Nov. 18, 1941. [12]

[Title of District Court and Cause.]

STIPULATION FOR SUBMISSION
OF CAUSE

It Is Hereby Stipulated by and between the parties hereto through their respective counsel, that the within cause now set for trial on November 24, 1941, may be submitted for decision upon the written stipulation of facts herein, all of the files and records of said cause, the within stipulation and briefs of the parties to be filed as follows:

(a) Plaintiff's brief to be filed within ten days following submission of said cause;

(b) Defendant's brief to be filed within twenty days thereafter; and

(c) Plaintiff's reply brief to be filed within ten [13] days after the filing of defendant's brief.

Dated: November 17, 1941.

ZAGON and AARON,

By HAROLD E. AARON,

Attorneys for Plaintiff.

FRANK J. HENNESSY,

United States Attorney.

ESTHER B. PHILLIPS,

Assistant United States

Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Nov. 18, 1941. [14]

[Title of District Court and Cause.]

MEMORANDUM OPINION

Roche, District Judge:

This is an action brought by plaintiff, Don Lee, Inc., to recover overpayment of Income and Excess Profits Taxes for the years 1935 and 1936, together with interest thereon.

In making its tax returns for the years 1931, 1932 and 1933, plaintiff computed depreciation upon its machinery, fixtures, and other depreciable property on the basis of a ten year life. Thus it made annual deductions of 10% of the value of the property for the three years. Thereafter the Commissioner of Internal Revenue estimated that fifteen years was the useful life of the property, and he recomputed the allowable depreciation for the years 1934 and 1935. The Commissioner used the following method. He took plaintiff's book value as of January 1, 1934, when it showed the original cost of the property, less depreciation for three years [15] on the basis of a ten year life. He spread this sum over the remaining twelve years of the fifteen year period which he fixed as the life of the property for future tax depreciation purposes. In 1936 plaintiff made its return on the twelve year evaluation basis used by the Commissioner of Internal Revenue in computing depreciation.

In each of the years 1931, 1932 and 1933, when plaintiff was reporting a 10% deduction for depreciation, its operating expenses and other deduc-

tions exceeded its gross income. Thus plaintiff was making no profits from which it might deduct its annual cost of depreciation.

On June 27, 1940, plaintiff filed with the Collector of Internal Revenue of the First District of California its claim for taxes erroneously assessed and overpaid for the years 1935 and 1936, together with interest. Plaintiff based its claims on the ground that the life of plaintiff's assets was fifteen years from the date of acquisition, as fixed by the Commissioner. Plaintiff asserted that since it had sustained losses for the years 1931, 1932 and 1933, its depreciation for those years should be adjusted in accordance with a fifteen year life, from the date of acquisition. Instead of deducting 10% for the three years in question, plaintiff should be permitted to reduce the excessive deductions so as to meet the requirements for equal deductions over the entire fifteen year period. Thus, the book value of plaintiff's property on January 1, 1934 would be increased, and a larger amount of depreciation would be allowable for 1935 and 1936. The Commissioner refused to make the requested refunds on May 10, 1941.

Plaintiff contends that the book value of the depreciable property should be increased by the amount of the excessive depreciation reported so that the allowable depreciation for the challenged years will be increased accordingly. If plaintiff's contention is correct, it is entitled to recover an overpayment of taxes. [16]

The question for decision is as follows: Where plaintiff reports excessive depreciation of property for three years, but does not benefit from such depreciation by an offset of income for these years because of business losses, should the portion of depreciation beyond the amount legally allowable be added to the value of the property for future depreciation?

The answer to this question rests on the interpretation of certain sections of the Revenue Acts of 1934 and 1936, which are applicable to the case presented to the court.

It must first be noted that a reasonable allowance is permitted to be deducted as depreciation in computing net income of a trade or business (Sec. 23 (1) of the Revenue Acts of 1934 and 1936). The basis for this depreciation is the same adjusted basis as that which is used for determining gain upon the sale of such property (Sec. 114 (a) of the Revenue Acts of 1934 and 1936). The adjusted basis shall be the cost (Sec. 113 (a), less deductions for depreciation to the extent allowed (but not less than the amount allowable), (Sec. 113 (b) and 113 (b) (1) (B) of the Revenue Acts of 1934 and 1936, and Art. 113 (b)-1 of Regs. 86 and 94).

The parties before the Court dispute the basis for depreciation. The above sections of the Revenue Act hold that the basis must be determined by decreasing the cost of the property by the amount of depreciation "allowed", but not less than the amount allowable. The life of plaintiff's property

is agreed to be fifteen years. Plaintiff contends that depreciation computed on a fifteen year life is the amount "allowable", and that depreciation based on a ten year life is in excess of the amount allowable. If plaintiff's contention is sound, then it made excessive deductions in the years 1931, 1932, and 1933. If these were not "allowed" within the meaning of the Revenue Act, the basis for future depreciation must be adjusted. What is meant by the term "allowed"? [17]

In the case of *Pittsburg Brewing Company vs. Commissioner* (1939), 107 F2nd 155, the court carefully construed the word "allowed" as it is used in Clause B of Section 113 (b) (1) of the Revenue Acts of 1934 and 1936, and Art. 113 (b)-1 of Regs. 86 and 94. In the *Brewing Company* suit, the taxpayer made depreciation deductions which were in excess of the correct amount, when based upon an adjusted value of the property as finally fixed by the government. The taxpayer asked the Commissioner to reduce the depreciation deductions to accord with the reduced value of the property. By lowering the deductions, the Commissioner would be increasing the value of the property, which the taxpayer had sold, and would thus be cutting the amount of taxable gain realized by the taxpayer on the sale of his property. The Commissioner refused to allow the depreciation deductions to be modified, on the ground that they had already been "allowed". The court took a contrary position, declaring in part:

“* * * is depreciation ‘allowed’ only if it is actually deducted from taxable income or must it also be considered as ‘allowed’ if it is reported on an income tax return but not taken as a deduction because of insufficiency of income? After full consideration of this question we have reached the conclusion that depreciation is not ‘allowed’ within the meaning of the act unless it is actually taken as a deduction against taxable income.

“ ‘Allow’ is defined as ‘To grant (something) as a deduction or an addition; esp., to abate or deduct; as, to allow a sum for leakage.’ Webster’s New International Dictionary, 2d Ed., p. 70, def. 5. ‘Allowed’ in the statute accordingly means granted as a deduction. Deduction is defined as ‘That which is deducted; the part taken away; as a deduction from the yearly rent.’ Webster’s New International Dictionary, 2d Ed., p. 284, Def. 2b. * * *”

The court then held that depreciation was not allowed solely by reason of the fact that it had been reported as a deduction. It was also necessary that the deduction should have reduced taxable income. Since the prior deductions which exceeded the depreciation “allowable”, did not reduce taxable income, the depreciation might properly be adjusted to eliminate the amount in excess of that allowable.

The only distinction between the above case and the [18] matter before the Court is that in the *Brewing Company* suit the taxpayer miscalculated

the original value of the property while in the case at bar the plaintiff erred in estimating the life of the property. This distinction does not alter the meaning of the term "allowable", which is the same in both cases.

Plaintiff's excess depreciation did not reduce its income tax payments in the years 1931, 1932, and 1933. Therefore, the deductions for these years were not "allowed", within the meaning of the Revenue Acts of 1934 and 1936, and plaintiff is entitled to have its excess depreciation added to the basis for depreciation in subsequent years.

Accordingly the Court will enter judgment in favor of plaintiff as prayed for, upon preparation of findings of fact and conclusions of law. Defendant will pay costs.

Dated: February 3, 1942.

(Signed) MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Feb. 3, 1942. [19]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This matter having come on regularly for trial on the 24th day of November, 1941, and the cause having been submitted on Stipulation of Facts and the admissions in the pleadings, and briefs having been

filed thereafter, and the Court having duly considered the facts, the issues of law and the argument of counsel, now makes the following

FINDINGS OF FACT

I.

The Court adopts the Stipulation of Facts made by the parties and by reference incorporates the same herein. [20]

CONCLUSIONS OF LAW

(1) That plaintiff paid excessive income and excess profits taxes for the year 1935 in the sum of \$880.13, which it paid to the United States Collector of Internal Revenue on July 11, 1938. Plaintiff paid excessive income and excess profits taxes for the year 1936 in the sum of \$1209.63, of which amount \$757.64 was paid on July 11, 1938. The balance of the overpayment of taxes for the year 1936 was paid prior to July 11, 1938, and said balance is barred by the statute of limitations.

(2) That plaintiff is entitled to judgment in the sum of \$880.13 and \$757.64, with interest thereon as provided by law from July 11, 1938, and for its costs as may be taxed.

Dated: March 30th, 1942.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Mar. 30, 1942. [21]

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 21866-R

DON LEE, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter having come on for trial and having been submitted on the stipulation of facts, briefs, having been filed and the Court having made its Findings of Fact and Conclusions of Law,

No, Therefore, It Is Hereby Ordered, Adjudged and Decreed that plaintiff have judgment against defendant in the sum of Sixteen Hundred Thirty-seven and 77/100 Dollars (\$1,637.77), together with interest thereon at the rate of six per cent (6%) per annum from July 11, 1938, and for its costs taxed in the sum of \$24.60.

Dated: This 30th day of March, 1942.

MICHAEL J. ROCHE,
Judge.

[Endorsed]: Filed Mar. 30, 1942. [22]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Now comes the defendant, the United States of America, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and hereby appeals from the judgment heretofore entered in the above entitled case in favor of the plaintiff.

Dated: May 27, 1942.

FRANK J. HENNESSY,
United States Attorney.
ESTHER B. PHILLIPS,
Assistant United States
Attorney.

[Endorsed]: Filed May 27, 1942, [23]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
RECORD ON APPEAL

Upon motion of the United States Attorney for the Northern District of California, it is hereby Ordered that the defendant the United States of America, may have to and including July 27, 1942, in which to docket its record on appeal in the above-entitled case.

Dated: July 14th, 1942.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed July 14, 1942. [24]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The defendant above-named having taken an appeal from the judgment entered herein on March 30, 1942 to the United States Circuit Court of Appeals for the Ninth Circuit, hereby designates the following parts of the record and proceedings for inclusion in the record on appeal:

- (1) The complaint;
- (2) The answer;
- (3) Stipulation of facts filed November 17, 1941;
- (4) Stipulation for submission of cause filed November 17, 1941;
- (5) Opinion of the Court filed February 6, 1942;
- (6) Findings of Fact and Conclusions of Law filed March 30, 1942. [25]
- (7) Judgment entered March 30, 1942;
- (8) Notice of Appeal filed May 27, 1942;
- (9) This designation of the record on appeal;
- (10) Statement of the points intended to be relied upon by defendant in its appeal.

FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed Jul. 18, 1942. [26]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY DEFENDANT ON THE AP-
PEAL TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT

Comes now the United States of America, de-
fendant and appellant herein, and hereby states the
points intended to be relied upon on the appeal of
the above-entitled case:

(1) In a case involving the proper method of
computing depreciation after it had been deter-
mined that the remaining life of a taxpayer's de-
preciable assets was longer than that originally
estimated, the defendant and appellant assigns
error to the District Court in that he failed to hold
that the cost basis of such assets to be recovered
at the [27] new rate of depreciation (6 2-3%) is
cost, less depreciation deducted at a higher rate
(10%) on the previous returns which had been ac-
cepted by the Commissioner.

(2) In such case the defendant assigns error to
the District Court in holding that since the tax-
payer had received no tax advantages from the de-
ductions at the higher rate (10%) in the previous
returns, the cost basis to be recovered should be
reduced by depreciation computed for previous
years at the new rate of 6 2-3 per cent.

FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed Jul. 18, 1942. [28]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 28 pages, numbered from 1 to 28, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Don Lee, Inc., Plaintiff, vs. United States of America, Defendant, No. 21866-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Three dollars and eighty cents (\$3.80) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 22nd day of July, A. D. 1942.

[Seal]

WALTER B. MALING,
Clerk.

WM. J. CROSBY,
Deputy Clerk. [29]

[Endorsed]: No. 10206. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Don Lee, Inc., Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 24, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10206

UNITED STATES OF AMERICA,
Appellant,
vs.

DON LEE, INC.,
Appellee.

DESIGNATION OF POINTS TO BE RELIED
UPON BY APPELLANT ON THE AP-
PEAL TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT

The Appellant hereby designates the points to be
relied upon in the prosecution of the appeal before

this court, the same points designated in the District Court, namely:

(1) In a case involving the proper method of computing depreciation after it had been determined that the remaining life of a taxpayer's depreciable assets was longer than that originally estimated, the appellant assigns error to the District Court in that he failed to hold that the cost basis of such assets to be recovered at the new rate of depreciation (6 2-3%) is cost, less depreciation deducted at a higher rate (10%) on the previous returns which had been accepted by the Commissioner.

(2) In such case the appellant assigns error to the District Court in holding that since the taxpayer had received no tax advantages from the deductions at the higher rate (10%) in the previous returns, the cost basis to be recovered should be reduced by depreciation computed for previous years at the new rate of 6 2-3 per cent.

FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed July 24, 1942.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD
TO BE PRINTED ON APPEAL

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

The appellant herein designates the entire record
lodged herein as the record to be printed on appeal.

FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed July 24, 1942.